LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 11 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-465

In the Matter of
TRANSOCEAN TERMINALS, INC., Bankrupt.

DEWAYNE F. TITUS, *Petitioner,*

vs.

IRVING J. KORNFIELD, Trustee, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

W. A. MCGUGIN,
GORDON NELSON,
1012 Security Bank Building,
Fresno, California 93721,
Attorneys for Petitioner.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO - CA 94105

Subject Index

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Constitutional provision and statutes involved	3
Statement	4
Reasons for granting the writ	5
Conclusion	7

Table of Authorities Cited

Cases	Pages
In re Aughenbough (3 Cir.) 125 F.2d 887	6
In re Lenrick Sales, Inc. (3 Cir.) 369 F.2d 439	6
Morgan v. U.S. (Mo. 1938) 58 S.Ct. 373, 304 U.S. 1, 82 L.Ed. 1129, rehearing denied 58 S.Ct. 999, 304 U.S. 1, 82 L.Ed. 1129	6, 7
Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 949	6
Sumida v. Yumen, 409 F.2d 654, 9 Cir. 1964	5
United States v. Dillman (C.C.A., Tex. 1945) 146 F.2d 572, certiorari denied 65 S.Ct. 1409, 325 U.S. 870, 89 L.Ed. 1989	7
Constitutions	
United States Constitution, Amendment V	3
Rules	
Federal Rules of Civil Procedure, Rule 8	3
Texts	
5 Moore's Federal Practice, Sec. 4309, pp. 1371-1372	6
IX Wigmore on Evidence (3rd Ed.) Sec. 2568, pp. 536-537	6
Statutes	
11 U.S.C., Section 47(c)	2
28 U.S.C., Section 1254	2

Subject Index

Page
2
2
3
3
4
6
7

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No.

In the Matter of
TRANSOCEAN TERMINALS, INC., Bankrupt.

DEWAYNE F. TITUS, *Petitioner,*

vs.

IRVING J. KORNFIELD, Trustee, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

DeWayne F. Titus, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on June 18, 1973.

OPINION BELOW

The opinion of the Referee in Bankruptcy is unreported and a copy thereof is appended to this petition in the Appendix at p. ii.

The opinion of the District Court for the Northern District of California has not yet been reported. The opinion of the Court of Appeals for the Ninth Circuit has not yet been reported.

JURISDICTION

The judgment of the District Court for the Northern District was made and entered on January 13, 1971 and a copy thereof is appended to this petition in the Appendix at p. vi. The judgment of the Court of Appeals for the Ninth Circuit was made and entered on June 18, 1973, and a copy thereof is appended to this petition in the Appendix at p. i. The jurisdiction of this Court is invoked under 11 U.S.C., Section 47(c) and 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

The questions presented are:

1. Whether a Referee in Bankruptcy may take judicial notice of the contents of his file without request therefor or notice to the party against whom the matter is to be used and without giving said party any opportunity to object thereto, or explain, or refute the effect thereof, or present what defenses

or evidence he may have concerning the validity or effectiveness of the evidence, facts, or documents to be so judicially noticed.

2. Whether a party to a controversy in a proceedings in bankruptcy is entitled to have matters therein determined according to procedural due process.

3. Whether a party to a proceedings can be deemed to have admitted the allegations in an application when he timely placed his answer properly addressed with postage prepaid in the United States mail and which was received late by the Court due to a late delivery by the United States Post Office.

4. Whether a judgment may be entered under Rule 8 of the Federal Rules of Civil Procedure for breach or failure to perform a contract or agreement when no damages have been alleged and no evidence of damages has been received.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision which is relevant to decision of this case is Amendment V of the United States Constitution which provides, in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT

In a controversy in a proceedings in bankruptcy a settlement agreement was entered into and was filed with and approved by the Referee in Bankruptcy. The settlement agreement did not contain any consent to or provision for the entry of any judgment against Petitioner. However, the Referee, without application or request, without notice to Petitioner, hearing or opportunity to be heard, made and entered a judgment upon said settlement agreement against Petitioner for $300,000.00. Petitioner filed a timely petition to review said judgment whereupon the Referee made and entered a supplemental judgment for said amount against Petitioner. Again there was no application or request for the supplemental judgment, no notice or hearing or opportunity for Petitioner to be heard. Petitioner also filed a timely petition to review the supplemental judgment. While these reviews were pending Respondent filed an application for judgment which was set for hearing on notice to Petitioner. Petitioner, through his attorney, whose office is in Fresno, some two hundred miles from Oakland, California, where the Referee's office is located, prepared "Objections to Jurisdiction and Answer and Response to Application for Judgment" and deposited it in the United States mail, properly addressed to the Referee with postage prepaid on February 13, 1971, five days before the hearing on said application. Attorneys to whom copies of the answer were mailed received their copies before the noticed hearing. The Referee's records show that he

received his copy after the hearing. As previously stated, the Post Office was late in delivering the original to the Referee's office.

Both parties appeared at the hearing upon Respondent's application for judgment. Petitioner renewed his objection to the Referee's summary jurisdiction and argued that under the case of *Sumida v. Yumen,* 409 F.2d 654, 9 Cir. 1964, the Referee had lost jurisdiction over the matter at the time Petitioner filed his petitions to review the first judgment and the supplemental judgment that had been entered by the Referee. Except for argument by both sides on the issue of jurisdiction nothing else transpired at said hearing. No witnesses were called, no testimony was taken, no exhibits or documents were offered or received. No request that the Referee judicially notice the settlement agreement in his file or any other fact or document was made. On February 19, 1971, the day after the hearing, the Referee made and entered a third judgment entitled "Corrected Judgment" for $300,000.00 against Petitioner. Upon review and appeal the District Court and the Court of Appeals for the Ninth Circuit affirmed the Corrected Judgment rendered by the Referee.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the decision of the District Court, which was affirmed by the Circuit Court of Appeals for the Ninth District, without additional decision of its own, holds that "the

Referee was not limited to a consideration of the evidence presented at the February 18, 1970 hearing" but "He was required to, and did, consider the entire bankruptcy proceeding in reaching his decision, even though other parts of the proceeding were not referred to at the hearing." In other words, that the Referee can take judicial notice of his entire file and facts not presented at the hearing without request therefor, or notice to the party against whom they are to be used. This is in conflict with the decision of the Court of Appeals for the Third Circuit, on the same matter, in the cases of *In re Aughenbough* (3 Cir.) 125 F.2d 887, 889, 890, and *In re Lenrick Sales, Inc.* (3 Cir.), 369 F.2d 439, 442. (See 5 Moore's Federal Practice, Section 4309, at pp. 1371-1372 and IX *Wigmore on Evidence* (3rd Ed.) Section 2568, pp. 536-537.)

The decision should be reviewed because Petitioner has had a judgment rendered against him without a fair hearing and without compliance with the basic requirements of due process. (This case will authorize such procedure in the Ninth Circuit.) This decision involves an important question of federal law concerning proper procedure and the basic requirements of procedural due process in matters heard by Bankruptcy Courts. It should be made clear that the basic requirements of due process as laid down by this Court in *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 949; *Morgan v. U.S.* (Mo. 1938) 58 S.Ct. 373, 304 U.S. 1, 82 L.Ed. 1129; rehearing denied, 58 S.Ct. 999, 304 U.S. 1, 82

L.Ed. 1129; and as set forth in *U.S. v. Dillman* (C.C.A., Tex. 1945) 146 F.2d 572, 574, certiorari denied, 65 S.Ct. 1409, 325 U.S. 870, 89 L.Ed. 1989, and other cases involving this matter should be applicable to the determination of controverted matters in bankruptcy proceedings.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, Fresno, California,
September 4, 1973.

W. A. McGugin,
Gordon Nelson,
Attorneys for Petitioner.

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit

In the Matter of Transocean Terminals, Inc., Bankrupt. Dewayne F. Titus, Appellant, vs. Irving J. Kornfield, Trustee-Appellee.	No. 71-2035 ORDER OF AFFIRMANCE

[June 18, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: MERRILL, KOELSCH and CARTER, Circuit Judges

PER CURIAM:

There being no reversible error in the Order of the United States District Judge, pursuant to 11 U.S.C. §67(c), denying on February 19, 1970, Dewayne Titus' Petition for Review of the "Corrected Judgment" of the Referee in Bankruptcy, the said order and judgment be, and the same are,

Affirmed.

In the United States District Court
for the Northern District of California

In Bankruptcy
No. 110194

In the Matter of
Transocean Terminals, Inc.,
a corporation,
Bankrupt.

CORRECTED JUDGMENT

The Application for Turnover Order and Order Disregarding Corporate Entities filed in the above-named bankruptcy proceeding on October 17, 1969, by Irving J. Kornfield, Trustee in Bankruptcy herein, and the Amended Application for Turnover Order and Order Disregarding Corporate Entities filed herein on November 7, 1969, by Irving J. Kornfield as Trustee in Bankruptcy herein, having come on regularly for hearing before this Court at various times, and one of the respondents, DeWayne F. Titus, having entered into a settlement agreement regarding said Trustee's applications which was filed herein on November 26, 1969, and said settlement agreement having been approved by an Order Approving Compromise of this Court filed herein on November 26, 1969, and this Court having made its Order giving said

Trustee judgment against said DeWayne F. Titus in the sum of Three Hundred Thousand Dollars ($300,000.00) by Order dated December 9, 1969, and said Order having been modified by Order Supplementing Trustee's Judgment against DeWayne F. Titus dated February 6, 1970, which said Order of February 6, 1970, was made at the behest of counsel for said DeWayne F. Titus and incorporated language suggested by said counsel for DeWayne F. Titus, and said counsel for said Titus having asserted that the Order of this Court of December 9, 1969, was not made after due notice of hearing thereof; and

Irving J. Kornfield, Trustee in Bankruptcy herein, having filed herein his verified Application for Judgment dated February 6, 1970, and this Court having issued its Order to Show Cause thereon dated February 9, 1970, this Court finds that said Order to Show Cause was duly and properly served in the manner therein provided and this Court further finds that on February 18, 1970, pursuant to stipulation of counsel for said DeWayne F. Titus made in open Court, said DeWayne F. Titus being personally present at the time, the hearing upon said Application for Judgment dated February 6, 1970, and upon the Order to Show Cause issued thereon and dated February 9, 1970, was advanced to said time and place; and

Said application and Order to Show Cause being then heard and arguments made, counsel for applicant Trustee in Bankruptcy and counsel for DeWayne F.

Titus, as well as DeWayne F. Titus himself, being present, and the matter submitted;

This Court finds that each and all of the allegations of the verified Application for Judgment dated February 6, 1970, are true and correct and concludes that the Trustee in Bankruptcy should have judgment against DeWayne F. Titus as hereinafter provided.

It Is Therefore Ordered that the Judgment of this Court entered December 9, 1969, in favor of Trustee Irving J. Kornfield and against DeWayne F. Titus in the amount of Three Hundred Thousand Dollars ($300,000.00), as well as the Order Supplementing Trustee's Judgment against DeWayne F. Titus entered February 6, 1970, are each vacated and set aside.

It Is Further Ordered, Adjudged and Decreed that Irving J. Kornfield as Trustee in Bankruptcy of Transocean Terminals, Inc., a corporation, Bankrupt, have judgment against DeWayne F. Titus in the sum of Three Hundred Thousand Dollars ($300,000.00).

It Is Further Ordered that whenever Titus has fully satisfied his obligation by way of paying to the Trustee the full sum of $300,000.00, or Trustee has secured payment by way of levy of execution against said Titus, that said fund be used to satisfy all allowed claims and costs in this proceedings and, pursuant to said settlement agreement, any final judgment against Titus which may be secured by the Trustee of the bankrupt estate of Christian & Porter Aluminum Company, and any funds still remaining be returned to Titus.

It Is Further Ordered that should any such surplus remain after the making of the above payments, any such surplus funds shall be the property of said Titus and shall in no manner be considered as surplus assets payable to Gust C. Nichandros, or any other stockholder or owner of the bankrupt Transocean Terminal, Inc.

It Is Further Ordered that pursuant to Rule 52(a) of the Federal Rules of Civil Procedure this Order shall constitute final Order of this Court and no further findings nor conclusions need be filed.

Dated: February 19, 1970.

Sheridan Downey, Jr.
Referee in Bankruptcy

In the United States District Court
Northern District of California

In Bankruptcy
No. 110194

In the Matter of
Transocean Terminals, Inc.,
Bankrupt.

MEMORANDUM AND ORDER DENYING DEWAYNE TITUS' PETITION FOR REVIEW

This matter comes before the Court on Titus' Petition for Review of the Referee in Bankruptcy's Corrected Judgment of February 19, 1970, and a further Amended Petition for Review of said Corrected Judgment. Titus raises several issues which are disposed of as follows:

1. This Court's Order of March 11, 1970, entered into by agreement of the parties thereto, determined that the December 9, 1969 Judgment, and the February 6, 1970 Order, which were vacated pursuant to the Order of Corrected Judgment of February 19, 1970, were vacated pursuant to due process of law. Thus, Titus thereby waived his claim that the Referee had no authority or jurisdiction to render the Corrected Judgment while a petition to review the initial judgment was pending.

2. The issue of whether Transocean Terminals, Inc. was properly adjudicated a bankrupt is not ap-

propriate for consideration at this time. The Referee's Order Adjudicating Debtor a Bankrupt was entered on October 17, 1969. Section 39(c) of the Act requires a person aggrieved by an order of a referee to file a petition for review of that order within ten days of the entry thereof. Unless such a petition is timely filed, the order of the referee becomes final. 11 U.S.C. §67(c). For the same reason, Titus cannot at this time challenge the validity of the settlement agreement. On November 26, 1969, the Bankruptcy Court entered an order approving the settlement agreement. A petition for review of this order should have been filed within ten days thereafter. Hence, this Court cannot disturb the referee's order of November 26, 1969, under the present petition for review.

3. Titus' assertion that the Corrected Judgment is deficient because he did not have an opportunity to be heard thereon must fail. In the reporter's Partial Transcript of the Hearing on Supplement to Judgment on February 18, 1970, Titus' counsel, W. A. McGugin, stipulated that the matter be heard at that time. Furthermore, the referee provided McGugin ample opportunity to state any arguments concerning the supplemental order. It would have been appropriate for McGugin to have raised the question of whether the Central Valley National Bank loan to Titus was a condition precedent to the effectiveness of the settlement agreement. The transcript clearly shows, however, that McGugin chose to discuss only the issue of the referee's jurisdiction.

4. Titus' charge that the findings of fact of the Corrected Judgment were not supported by evidence before the referee is without merit. A finding of fact of a Referee in Bankruptcy must be adhered to unless it is clearly erroneous. General Order in Bankruptcy No. 47; *Flaxman, Coleman, Gireman & Rosoff v. Cheek,* 355 F.2d 672 at 674 (9th Cir. 1966).

In judging the validity of the allegations of the Trustee's Application for Judgment dated February 6, 1970, the referee was not limited to a consideration of the evidence presented at the February 18, 1970, hearing. He was required to, and did, consider the entire bankruptcy proceeding in reaching his decision, even though other parts of the proceeding were not referred to at the hearing. *DeMet v. Harralson,* 399 F.2d 35, 39 (5th Cir. 1968); *In re Ira Haupt & Co.,* 398 F.2d 607, 612 (2d Cir. 1968). The findings in the Corrected Judgment of February 19, 1970, were that the allegations in the February 6, 1970, Application for Judgment were true and correct. Having reviewed the bankruptcy proceedings, this Court is satisfied that said findings are supported by sufficient evidence, and that they are not clearly erroneous.

Therefore, the Petition for Review of Dewayne Titus from the Corrected Judgment of February 19, 1970, is denied, and said judgment is hereby confirmed.

Dated: Jan 13 1971

/s/ Robert F. Peckham
United States District Judge